Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

In re the Marriage of MARY K.
and JAMES M. ODDINO

MARY K. ODDINO
Petitioner,

v.

JAMES M. ODDINO
Respondent;
HUGHES NON-BARGAINING RETIREMENT PLAN,
Respondent;

On Petition for a Writ of Certiorari to the California Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the opinion that an alternate payee who seeks to have her domestic relations order found qualified and enforced against a pension plan may only sue under the civil enforcement procedures for beneficiaries and participants at 26 U.S.C. §1132

   a) violate the statutory denial of beneficiary status to such alternate payees at §1056(d)(3)(J),

   b) ignore the availability of all State law relating to Qualified Domestic Relations Orders ("QDROs") at §1144(b)(7), and

   c) thwart the intent of Congress to rely on "State law providing for [QDRO] rights and payments", to apply "State court procedures" for the "enforcement of [QDROs]", and to assure that "the domestic relations court is the appropriate forum to … settle all controversies"?

2. Is the opinion that 26 U.S.C. §1056(d)(3)(E)(i)(II) prohibits QDRO formulas for determining benefits any from referencing an early retirement benefit invalid, and does it frustrate the intent of Congress that

   a) a QDRO may order "all … of the benefits payable with respect to a participant under a plan" per subparagraph (B)(i)(I),

   b) a QDRO may express the amount to pay in any legible manner per subparagraph (C)(ii),

   c) a QDRO provides access to early retirement benefits per subparagraph (E)(i)(I), and

   d) any benefits paid early must be treated as accrued benefits, protected from any denial per §1054(g)(2)?

3. Does permitting payments under a QDRO without the segregated amount it ordered per 26 U.S.C. §1056(d)(3)(H) obstruct the intent of Congress that a QDRO may order payments retroactive to 18 months?

PARTIES

The parties are as stated in the caption, except that the United States Department of Labor and, jointly, the California Employers Law Council and The Employers Group filed amicus briefs at the State Court of Appeals and State Supreme Court on behalf of Claimant.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS AND ORDERS BELOW 1
STATEMENT OF JURISDICTION 1
STATUTES AND REGULATIONS 2
STATEMENT OF THE CASE 3
ARGUMENT 10
Conclusion 16
APPENDIX ..... App. 1
APPENDIX A, *In re Marriage of Oddino, "Oddino II"* ..... App. 1
APPENDIX B, *In re Marriage of Oddino, "Oddino I"* ..... App. 27
APPENDIX C, Statement of Decision and Order on Order To Show Cause ..... App. 37
APPENDIX D, California Supreme Court Denial of Petition for Rehearing ..... App. 40
APPENDIX E, Qualified Domestic Relations Order ..... App. 41
APPENDIX F, Statutes ..... App. 44
APPENDIX G, Legislative History ..... App. 63

TABLE OF AUTHORITIES

1. CASES

Amato v. Western Union International, Inc. (2nd Cir. 1985) 773 F.2d 1402 *cert. dismissed. Western Union International Inc. v. Amato* 474 U.S. 1113 (1986) ("*Amato*") 4, 8

American Stores Company v. American Stores Company Retirement Plan (10th Cir. 1991) 928 F.2d 986 ("*American Stores*") 4, 8

American Stores Company, et al, v. American Stores Company Retirement Plan et al (D. Utah 1989) 716 F.Supp. 1392 reversed (10thCir. 1991) 928 F.2d 986 4

Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund (3rd Cir. 1985) 763 F.2d 574 ("Bencivenga") 4

Francis v. United Technologies (1978) 458 F.Supp. 84 15

In re Marriage of Gillmore (1981) 29 Cal.3d 418 [629 P.2d 1,174 Cal.Rptr. 493] ("*Gillmore*") 9

In re Marriage of Oddino (1996) 48 Cal.App.4th 965, depublished and reversed (1997) 16 Cal.4th 67 ("*Oddino I*") 1, 4, 6, 11, App.27

In re Marriage of Oddino (1997) 16 Cal.4th 67 ("*Oddino II*") 1, 3, 7-13, App.1

Lockheed v. Spink (1996) __U.S.__, 116 S. Ct. 1783 ..... 8, 9, 13

Mackey v. Lanier Collection Agency & Serv. (1988) 486 U.S. 825 ..... 14, 16

Mead Corp. v. Tilley (1989) 490 U.S. 714 15

Stone v. Stone (9th Cir.1980) 632 F.2d 740 15

2. STATUTES

28 U.S.C. §1257(a) 2, App.57

ERISA

Retirement Equity Act of 1984 ("REA"), 26 U.S.C. §1001 et seq., Public Law 98-397, August 23, 1984, 29 U.S.C. §1056(d)(3):
Subp. (B) 9, 10, 13, 16, App.48
Subp. (B)(i)(I) ..... i, App.48
Subp. (C) 10, 12, App.48
Subp. (C)(ii) ..... i, 6, 10, App.48
Subp. (D) 12, App.49
Subp. (D)(i) 12, App.49
Subp. (D)(ii) 10, 12, App.49
Subp. (E) 5, 8, 10, 12, 13, App.49
Subp. (E)(i)(I) ..... i, App.49
Subp. (E)(i)(II) ..... i, 8, 9, 12, App.49
Subp. (H) ..... i, 10, 11, 13, App.51
Subp. (J) ..... i, 7, 11, 13, App.52
§1002(3) "plan" 8, 12, App.44
§1002(5) "employer" 8, 12, App.44
§1002(8) "beneficiary" 7, App.44
§1002(22) "normal retirement benefit" 4, 8, 12-13, App.44
§1002(23) "accrued benefit" 13, App.45
§1054(b)[Benefit accrual requirements, Enumeration of plan requirements](1) 5, App.45
§1054(c)[Employee's accrued benefits derived from employer and employee contributions](3) 3, App.46
§1054(g)[Decrease of accrued benefits through amendment of plan](2) ..... i, 4, 10-11, 13, 15-16, App.46
§1056(d)[Assignment or alienation of plan benefits](3) 10, App.48
§1104[Fiduciary duties](a) Prudent man standard of care (1) 9, 13, App.52
§1104[Fiduciary duties](a) Prudent man standard of care (1)(D) 9, 13, App.53
§1132 Civil enforcement ..... i, 7, 14, App.55
§1132(a) Persons empowered to bring a civil action 15, App.55
§1132(a)(1)(B) 7, 15, App.55

§1132(a)(3) 7, App.55
§1132(e)[Jurisdiction](1) 7, App.56
§1144[Other laws](a) Supersedure 14, App.57
§1144(b)[Construction and application](7) ..... i, 7, 10, 14-16, App.57
Treasury Regulations, App.
26 C.F.R. §1.411(a)-7(a) Accrued benefit 13, App.58
26 C.F.R. §1.411(a)-7(c) Normal retirement benefit 7, 13, App.59

3. Other Authorities
House Report 98-655, Part I, Retirement Equity Act of 1984, 98th Cong., 2d Sess. 14, App.64
Senate Report No. ("SR") 98-575, P.L. 98-397, page 18-19 (U. S. Code, Congressional and Administrative News, v. 4, 98th Congress, 2nd Session, pages 2564-2565) 8, 14, App.63

PETITION FOR A WRIT OF CERTIORARI

Petitioner, MARY K ODDINO (GLASSMAN), (hereinafter "Petitioner" or "MARY") respectfully prays that a writ of certiorari issue to review the opinion of the California Supreme Court, rehearing of which it denied on October 15, 1997.

OPINIONS AND ORDERS BELOW

The opinion of the California Supreme Court *In re Marriage of Oddino* (1997) ("*Oddino II*") is reported at 16 Cal.4th 67 and is reprinted at page App.1, Appendix A. It reversed the California Court of Appeals opinion *In re Marriage of Oddino* (1996) ("*Oddino I*"), reported at 48 Cal.App.4th 965, is reprinted at page App.27, Appendix B. The trial court Statement of Decision and Order on Order to Show Cause is reprinted at page App.37, Appendix C. The California Supreme Court Order denying rehearing October 15, 1997 is reprinted at page App.40, Appendix D. The Stipulation and Order re Modification of Interlocutory Judgment and Qualified Domestic Relations Order ("QDRO"), March 24, 1989 is reprinted at page App.41, Appendix E.

STATEMENT OF JURISDICTION

The ruling of the California Supreme Court presents important issues of federal law which the Supreme Court of the United States should settle. Included are how the amount and timing of pension benefits in a Qualified Domestic Relations Order ("QDRO") are determined, whether the Employee Retirement Income Security Act of 1974, as amended by the Retirement Equity Act of 1984 ("REA") contains the conflicting sections the California Supreme Court found; and whether State court jurisdiction to

determine and enforce a QDRO includes all State laws related to QDROs, or whether only federal courts and law are available.

The Opinion of the California Supreme Court was filed on July 28, 1997, and that Court denied rehearing on October 15, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

STATUTES AND REGULATIONS

Applicable parts of the Employee Retirement Income Security Act of 1974, as amended by the Retirement Equity Act of 1984 ("REA"), 26 U.S.C. §1001 et seq., and Federal Regulations issued thereunder by the Secretaries of Labor and the Treasury.

STATEMENT OF THE CASE

Mary K. Oddino (Glassman) (hereafter, "MARY" or "Petitioner") Petitions for a Writ of Certiorari to the California Supreme Court to review its interpretations of federal law *Oddino II*, (Appendix A, page App.1).

MARY and her husband, James M. Oddino ("JAMES") dissolved their marriage in 1983. They reserved jurisdiction of his pension with the Hughes Aircraft Non-Bargaining Retirement Plan ("Claimant" or "Plan")[1], an ERISA-qualified, defined benefit plan.[2] As his eligibility for early retirement neared, JAMES and MARY created a Domestic Relations Order ("DRO") by filling in the Plan's blank form QDRO. The Plan had confirmed in its "Retirement Plan Projection for MARY ODDINO GLASSMAN" that her benefits would be a share of his early retirement benefit ("ERB"), a share then worth $3,632 per month[3]. The DRO ordered Claimant to pay MARY where "[her] interest in the [Plan] is to be determined by the following formula:" 36.6231% of JAMES' accrued benefit as of April 1, 1988,

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[1]The subject Plan covers 72,716 participants or beneficiaries, with assets exceeding liabilities of $5,517,311,000 according to its latest (1996) Summary Annual Report. According to Pensions & Investments News, a trade paper for plan administrators, the trust funds for the group of plans administered by Claimant, including the subject Plan, are worth $9.6 billion, and rank 64th among U.S. companies. These data for Hughes do not include General Motors, until December, 1997 its parent company, which is ranked No. 2 with assets of $72 billion. The total of the top 166 pension trust funds is $2.2 trillion.

[2]A defined benefit plan specifies or "determines" life time pensions. They are made definitely determinable by two factors, an annuity amount and a start date. Such a benefit is called a "Single Life Annuity", where single life is a reference to actuarial dependence on only the life expectancy of one person, the participant. Under the subject plan, the normal retirement age benefit (herein, "NRAB") and the Vested Retirement Benefit ("VRB") are determined from age 65, the Plan normal retirement age.

[3]The stated dollar amount of pension benefits in the Petition is the initial monthly benefit under the Plan's Five Year Period Certain option, which MARY elected.

the date JAMES was first eligible to retire. He had at that time earned the Plan's ERB[4] under its Rule of 75[5].

After being served with the DRO, on June 1, 1989 Claimant wrote MARY confirming her DRO was a QDRO, but refusing to pay either the $3,632 per month it had estimated to her, or as of April 1, 1988. Claimant told MARY it would pay only $1,370 per month. This was after reducing for an "early retirement subsidy", a term nowhere found in any Plan document. Claimant then offered payment retroactive as of April 1, 1989, asserting the Plan had no retroactivity provisions.

MARY wrote back requesting justification for the subsidy deduction, a showing of how her benefits were calculated, and an official, standard Retirement Plan Projection. She received none of these, but on November 15, 1989 Claimant did write to inform her that the U.S. Circuit and District Court decisions[6] invoking §1054(g)(2) did not

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[4]The Plan determines the ERB as of the actual or assumed date of separation, and it may be paid later actuarially increased. The ERB annuity is the same as the annuity in the Accrued Benefit, also determined on the date of separation. The Plan has no provision to pay the Accrued Benefit except as an ERB per the Rule of 75.

[5] The term "Rule of 75" is not used in the Plan, it is ambiguous in the Summary Plan Description, and Claimant has used the synonym "Magic 75". The elements of this rule of eligibility for the Plan's Accrued Benefit include age at least 55, and years of service plus age, of at least 75. Claimant and the Court below agreed that actual retirement was required, but the assumption of actual retirement is in both the Plan and ERISA discussed *infra*.

The Plan has three normal retirement benefits ("NRBs"), the Early Retirement Benefit ("ERB"), the Normal Retirement Age Benefit ("NRAB"), and a Late Retirement Benefit. The Plan also provides that the annuity calculated for any NRB is not less than the largest of any early benefit available by assuming actual separation from the service at any previous time, thus effecting ERISA's NRB definition at §1002(22). See *Oddino I*, p. 973

[6]*American Stores Company, et al, v. American Stores Company Retirement Plan et al* (D. Utah 1989) 716 F.Supp. 1392 ("AmStores'89") reversed (10thCir. 1991) 928 F.2d 986, interpreting *Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund.* (3rd Cir.

apply because "Hughes is not attempting to amend its retirement plan". It further asserted that "the [Rule of 75] subsidy ... is an accrued benefit." It said it reduced MARY's benefits by invoking the clause in ERISA 29 U.S.C. §1056(d)(3)(E) ("Subp. (E)"[7]), "taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement". MARY objected.

In March, 1990 the Plan began sending $1,563.70 to her. She then joined the Plan to her dissolution action, and filed an Order to Show Cause ("OSC") to determine the amount of her QDRO benefits and enforce payment. In discovery, Claimant revealed that it had paid 36.6231% of an actuarially reduced Vested Retirement Benefit ("VRB")[8], miscalculated, and as of March 1, 1990, a monthly sum of $1,563.70.

In a Statement of Decision and Order (Appendix C, App.37), the OSC court first found that the QDRO constituted a waiver of MARY's rights to an order for the balance of her payments from JAMES, and so made no determination of the amount due her as community

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1985) 763 F.2d 574 and *Amato v. Western Union International, Inc.* (2nd Cir. 1985) 773 F.2d 1402 *cert. dismissed. Western Union International Inc. v. Amato* 474 U.S. 1113. *American Stores Company v. American Stores Company Retirement Plan* (10th Cir. 1991) 928 F.2d 986 reversed as the law read pre-REA, but agreed that §1054(g)(2) was dispositive post-REA. See footnote 14, *infra.*

[7]Unless otherwise stated, all references of the form "Subp. (X)" are to §1056(d)(3)(X), the QDRO provisions at Subp. (A) through (N). The Internal Revenue Code contains these same provisions with different subparagraph designations and titles added at 26 U.S.C. §414(p).

[8]Every defined benefit plan must contain both an NRAB and a VRB determined from normal retirement age. ERISA mandates at §1054(b)(1) the VRB annuity is a fraction not greater than one of the annuity amount in the plan's Accrued Benefit. This makes the VRB annuity equal to the Accrued Benefit annuity when the participant is 100% vested, after 10 years service.

A participant earns his VRB unconditionally, after separating from the service only if he has not earned an NRB. The Plan determines the VRB from age 65, but optionally permits it to be paid early after age 55, reduced by the Plan's Early Retirement Factor.

property.[9] It then found that the Plan's ERB "constitutes a subsidy rather than an accrued benefit", and disallowed her QDRO formula ordering paid a percentage of the ERB (as authorized per Subp. (C)(ii)). Next, instead of ruling on the effective date for payment of her benefits, the OSC court obtusely found "Claimant did not take an unreasonable amount of time to approve the [QDRO]", and anyway the amount paid was sufficient "to recompense Petitioner for the period of time prior to commencement of such payments". It further found that "Estoppel is not allowed in this action as a matter of law under [ERISA]." On these interpretations of federal law, the OSC court denied MARY any relief. She appealed.

On August 16, 1996, the Second Appellate District of the Court of Appeal, Division Two, reversed. *Oddino I*, (Appendix C, App. 37). It awarded MARY her full benefits of $3,689.60 per month as of April 1, 1988, plus interest. The Court granted rehearing, and permitted the Department of Labor ("DOL") and jointly the California Employment Law Council and The Employers Group (hereafter "CELC") to file briefs as *amicus curiae*. Claimant then retracted its determination that MARY's DRO was a QDRO, and DOL contended that California courts lacked jurisdiction. The Court of Appeal found for MARY, and found DOL's position without merit and not properly before the Court.

Claimant, DOL[10], and CELC[11] then sought review in the California Supreme Court.[12] They contended that the action

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[9]The federal question posed by the OSC court is whether the QDRO acts to waive any other State claims for benefits against the employer or ex-spouse.

[10]The Secretary of Labor as Chairman of Pension Benefit Guaranty Corporation ("PBGC") insures "nearly 33 million participants in almost 48,000 defined benefit plans", but administers at a profit the pensions of over 200,000 payees and over 240,000 deferred payees from terminated plans. *PBGC Insurance Data Book 1996, PBGC Single-Employer Program.*

[11]California Employment Law Council claims to represent about sixty private sector employers in the State of California, collectively

was not a claim for benefits, for which State courts have concurrent jurisdiction per §1132(a)(1)(B). Instead, they asserted it was an action to enforce ERISA for which federal district courts have exclusive jurisdiction per §1132(a)(3). MARY asserted her action was indeed a claim for benefits, but since Claimant had retracted its qualified determination she no longer had a QDRO. Whereupon, she said Subp. (J) denied her beneficiary status per §1002(8) and thus standing to sue under any part of §1132. Instead, she asserted her rights under §1144(b)(7). On July 28, 1997, *Oddino II* issued and found it had jurisdiction to find a DRO qualified under §1132(a)(1)(B)[13] and §1132(e)(1). It refused to consider the Legislative History of REA, the effect of Subp. (J), and of §1144(b)(7). *Oddino II* also said that while 26 C.F.R. §1.411(a)-7(c) instructs how to make the "greater of" calculation for finding the Normal Retirement Benefit ("NRB"), §1002(22), the calculation did not require an

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employing in excess of a half million Californians. The Employers Group represents "nearly 5,000 companies of all sizes in every industry, which collectively employ approximately 2.5 million employees."

[12]The extent of the pension withholding practices complained of here is seen in the letters to the California Supreme Court in support of Claimant from the following firms: BHP Minerals ("sponsors plans covering thousands of US employees") September 19, 1996; Food Pension Trust ("Over 100,000 employees and [retirees]"; "ninth largest jointly-administered private pension plan in the United States") September 26, 1996; Hewitt Associates ("over 5,500 consultants and actuaries", "over 70 percent of the Fortune 500 industrial companies" are clients, including Claimant) November 5, 1996; International Business Machines Corp. (reportedly #12 US pension fund worth $39 billion) September 30, 1996; Lockheed Martin Corp. (# 27 at $20.5 billion; "Lockheed Retirement Plan has approximately 86,315 participants") October 24, 1996; Nicholas L. Saakvitne (attorney specialist in pension law) September 20, 1996; Shardlow & Vick (attorneys exclusively in ERISA law) September 19, 1996; and Trucker-Huss (attorneys at law "advising sponsors and administrators of private and governmental retirement plans) September 18, 1996. These friends of Claimant are a small fraction of all defined benefit programs and beneficiaries, but certain to grow to all plans under *Oddino II*.

[13]Unless otherwise stated, all references to a section (§) are to United States Code, Title 29 (Labor), (29 U.S.C. §x).

actuarial adjustment. This was on the theory that "a difference in *commencement time* of annuity payments is not a difference in the form[14] of annuity". Original emphasis, *id.*, p.86, fn. 11.

Based on its interpretation of the definition of NRB, and on its "blue pencil edit" of the definition of accrued benefit, *Oddino II* determined that every ERB contained a subsidy and reversed the Court of Appeal finding that the ERB was an accrued benefit. The California Supreme Court thus sided with the Tenth Circuit in *American Stores*, *supra*, and against the Second Circuit in *Amato*, *supra*.[15]

Next, *Oddino II* declared with no discussion that the Rule of 75 ERB, a benefit provided solely under the terms of the Plan, contained an employer subsidy! It ignored the definitional distinction in ERISA between *plan* at §1002(3) and *employer* at §1002(5). By this ignorance, the Court put this ERB into the class of benefits Subp. (E)(i)(II).excludes from a plan's liability.

The *Oddino II* Court concluded that under Subp. (E)(i)(II) a QDRO could not order a share of a plan's ERB paid before the participant actually retired. This was because of an inferred *quid pro quo*: payment of the ERB for actual retirement. The below Court read the plan amendment case of *Lockheed v. Spink* (1996) __U.S.__, 116 S. Ct. 1783 to find all ERBs necessarily contain this *quid pro quo*. Thus, the California Supreme Court infers Subp. (E) enacted 12 years earlier, is so designed:

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[14]"[A] pension plan is not a qualified plan unless all benefits provided by the plan are definitely determinable" Senate Report No. 98-575, page 27. This requirement is met if the following are known: the amount of each annuity, the start date of payments, and the duration of payments (even if for a life time known only from mortality tables). A reasonable meaning to "form" of a benefit is the application of these three factors. To calculate the value of a benefit requires applying these factors plus actuarial principles. Those principles require set standards for the interest rate and the mortality statistics.

[15]See footnote 6.

> As sponsor of the Plan, Hughes would remain responsible for funding the portion of James's Rule of 75 benefits paid to Mary, while James continued to work and receive salary and other benefits from Hughes. Section 1056(d)(3)(E)(i)(II) appears designed to avoid just such a result. *Oddino II*, p. 88.

Therefore, notwithstanding the explicit, express, and contradicting assumption of actual retirement in ERISA (Subp. (B) ('payable with respect to a participant") and Subp. (E)(i)(II) ("as if the participant had retired")), in California's *Gillmore* rule[16], in the subject Plan[17], and in MARY's QDRO[18], the California Supreme Court, citing *Lockheed v. Spink*, *supra*, concluded that even without amendment, "Such subsidized early retirement programs are a '*quid pro quo* between the plan sponsor and the participant.' (*Id.* at p. __ [135 L.Ed.2d at p. 165].)" All this rationale was to avoid a QDRO formula to pay a percent of a plan's ERB.

Oddino II refused to reconcile its inferred *quid pro quo*, admittedly an unwritten benefit to the employer sponsor, with the ERISA instruction that a plan be administered "solely in the interest of the participants and beneficiaries". §1104(a)(1). It is also impossible to create an unwritten *quid pro quo* if that Court abided §1104(a)(1)(D) that plans be

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16"Under the cases and statutory law, Earl cannot time his retirement to deprive Vera of an equal share of the community's interest in his pension. It is a "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse.'" *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 423 [629 P.2d 1,174 Cal.Rptr. 493]. "[T]he nonemployee spouse ... has the choice as to when his or her share of the pension shall begin." *Id.*, 425.

17"[I]n no event shall a Participant's ... monthly Benefit under [any NRB] be less than the largest [early] monthly Benefit ... to which he could have become entitled at any time by incurring a Separation from the Service." Plan ¶4.2(c). "'Early Retirement Benefit' of a Participant ... means the Benefit payable to or with respect to him under Section 4.8." *Id.*, §1.23.

18"The payments to Petitioner are to be determined as if Respondent had retired on April 1, 1988". MARY's QDRO, §c.

administered only "in accordance with the documents and instruments governing the plan". Finally, the Court below created an actual retirement requirement which the Plan and ERISA (Subp. (B) and Subp. (E)) both contradict by providing the assumption of actual retirement.

Oddino II found MARY's DRO qualified but for a lesser amount. That Court refused her request to perfect the order by restating the formula for amount into fixed dollar terms per Subp. (C)(ii). It also refused to test whether the amount originally ordered was in excess of the Plan's liability, thus causing a cost increase prohibited by Subp. (D)(ii). The below Court ignored the application of §1054(g)(2), refused to consider the conflict it's conclusion created between Subp. (C) and Subp. (E), refused to consider Claimant's failure to pay any segregated amount per Subp. (H), and refused to estop Claimant from paying a lesser benefit than it represented it would pay in its written estimate.

It then denied Mary's request for rehearing on October 15, 1997.

ARGUMENT

With REA, Congress opened the purse of pension benefits earned in ERISA plans to State domestic relations courts. It gave them access to all the benefits participants had accrued on becoming eligible for early retirement, even though they continued to work. It did so by amending ERISA's anti-alienation and supersedure provisions at 1056(d)(3) and §1144(b)(7), respectively.

Congress first took control of all State court orders against pension benefits (anti-alienation) and then created the exemption of the QDRO to provide uniformity for proper assignment orders. Congress then amended ERISA's supersedure clause to make all State law available as was necessary to administer and enforce the orders. Finally, to assure that State and not federal courts would be the forum to

settle all controversies, Congress denied alternate payees access to ERISA's existing civil enforcement procedures and causes of action until after the plan found their orders qualified. Subp. (J).

Congress intended "that plan administrators make every effort to assure that alternate payees receive the benefits which have been awarded them by the State domestic relations courts." The subject Plan has successfully resisted paying the full amount the QDRO here ordered paid and from the date ordered. Plus with DOL's assistance it has prevented recognition that MARY's rights and standing are under State law. *Oddino II* approved these practices. They are obnoxious, in conflict with and overturn the principle purposes of the QDRO.

The California Supreme Court in *Oddino II* determined that the Plan's ERB was a subsidy by falsely relying on fragments of ERISA statutes and Regulations. The U.S. Circuit Courts divided on the question of what was an ERB, an accrued benefit or a subsidy. Those same courts did not disagree, however, that since REA enacted §1054(g)(2), ERBs and subsidies alike are treated as accrued benefits. The Court of Appeals in *Oddino I* agreed, holding that the ERB was an accrued benefit, not a subsidy. The Court of Appeals also ruled that the plan was to pay the full amount from the date ordered in the QDRO, that is, the segregated amount under Subp. (H). The California Supreme Court reversed, holding that the Plan's ERB was an employer subsidy and could not be referenced in the formula for the amount the QDRO orders paid. Thus the *Oddino II* Court denied alternate payees their right to share in ERBs, refused to treat the ERB as an accrued benefit as §1054(g)(2) would require, and as well refused to award the segregated amount.

In making its order, *Oddino II* included the following findings and determinations, all of which involve important open questions of federal law which the Supreme Court of the United States should settle:

1. California falsely interpreted and ignored the separate integrity of Subp. (E) to infer additional requirements for what cannot be in a QDRO where ERISA has spoken at Subp. (D).[19]

2. *Oddino II* converts Subp. (E)(i)(II) from being the measure of maximum plan liability (its cost) to being another restriction on the formula for the amount payable. *Oddino II* thus removes the standard which Subp. (D)(ii) applies to determine whether the QDRO orders an amount that causes a prohibited cost increase, an amount in excess of the plan's maximum liability.

3. Without discussion, *Oddino II* found there was an employer subsidy in every ERB, even if such a benefit is only defined in and payable from a plan. Ignored is the separate integrity and definitions of plan (§1002(3)) and employer (§1002(5)).

4. *Oddino II* further ignored the contradicting examples in the Treasury Regulations and Legislative History to find every ERB necessarily contained a subsidy. In defense of this conclusion it simply said that the definition of subsidy from the Legislative History when applied to the NRB definition at §1002(22) created circularity. Otherwise the result of the application of ERISA definitions contradicted its belief that every ERB contains a subsidy.

5. ERISA expresses the definition of accrued benefit under the Act in terms of the accrued benefit under the plan, and if the latter accrued benefit is expressed as a benefit beginning at an early age (an ERB) it must be actuarially

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[19]That is, Subp. (E) states what a plan cannot say (or do). Subp. (E) reaches the QDRO only through Subp. (D)(i) where ERISA prohibits a QDRO from not complying with certain provisions in the plan. Subp. (E) is permissive with respect to QDROs. It admits a larger class of DROs than Subp. (C) and Subp. (D) otherwise permit. *Oddino II* ignored the structure of Subp. (E) and misunderstood its provisions to create a smaller class of permissible DROs. These structural considerations are sufficient to defeat the California Supreme Court ruling, independent of the substantive provisions in Subp. (E).

increased to the normal retirement age. §1002(23). *Oddino II* construed §1002(23) to mean the accrued benefit under the plan is a benefit which must begin at normal retirement age. This ignores that 26 C.F.R. §1.411(a)-7(a) expressly includes any ERB in the accrued benefit under the Act.

6. Contrary to the definition of normal retirement benefit at §1002(22), *Oddino II* said the selection of the greater of the ERB or NRAB does not require converting the ERB to an age 65 benefit. Plus, *Oddino II* says 26 C.F.R. §1.411(a)-7(c), although so instructing, does not require the conversion be based on actuarial principles. Per that opinion, neither the statute nor the Regulation applied because "a difference in commencement time of annuity payments is not a difference in the form of annuity." *Id.*, p. 86, fn. 11.

7. Further ignored below was that ERISA requires ERBs and subsidies be treated as accrued benefits per §1054(g)(2), and that a plan may not put in practice any act not permitted under the terms of the plan (§1104(a)(1)(D)).

8. By inferring a *quid pro quo* payment only in exchange for actual retirement, *Oddino II* contradicts the assumption of actual retirement which Subp. (B) and Subp. (E) supply. The inference of a *quid pro quo* benefits the employer, and if not reversed, *Oddino II* r[illegible]ks the explicit proscription of §1104(a)(1) that a plan may be administered only on behalf of participants and be[illegible]ciaries; and the further proscription of §1104(a)(1)(D) that a plan may not practice any act not permitted in its written terms. Finally, the below Court relied on an overbroad reading of *Lockheed v. Spink, supra.* That authority approved a plan amendment, not an unwritten *quid pro quo* plan practice.

9. Ignored further is the Subp. (H) provisions for computing and paying the segregated amount to alternate payees (including MARY). *Oddino II* simply reversed the lower court order that it be paid.

10. Ignored too are both that Subp. (J) denies MARY access to ERISA civil enforcement procedures and causes of

actions (§1132), and that State law applies instead under §1144(b)(7).

The trial court, the Court of Appeal and the Supreme Court of California provided differing results and three different opinions. The Circuit Courts of Appeals are also in conflict regarding issues involved in MARY's case. Evident is one or more elements of confusion and uncertainty regarding the purpose and meaning of ERISA.

The Supreme Court of the United States has not previously taken a matter relating to the amount and timing of benefits assigned in a QDRO, the anti-alienation question. In *Mackey v. Lanier Collection Agency & Serv.* (1988) 486 U.S. 825, this Court did consider the meaning of the QDRO exception to supersedure at §1144(b)(7) as it might provide insight into congressional intent underlying the general supersedure clause at §1144(a). That opinion held that the supersedure clause related to benefit plans, while the anti-alienation provision related to pension benefits.

Mackey struggled to solve an apparent problem with the two ERISA preemptions, anti-alienation and supersedure. How could §1144(b)(7) save only QDROs from supersedure when those orders alienate pension benefits but supersedure at §1144(a) applies to plans as a whole and not to benefits? The opinion suggested alternative interpretations for §1144(b)(7) to leave the problem unsettled, but the issue fueled the dissent. It believed that only the QDRO itself was saved, which would be surplusage under the ruling that supersedure applied to plans, and not to pension benefits.

The litigation below of this QDRO matter reveals that the QDRO savings clause saves not QDROs, but State law relating to QDROs. Congress explicitly expressed this intent in Senate Report No. 98-575 and House Report 98-655, Part I, Retirement Equity Act of 1984, 98th Cong., 2d Sess. See Appendix G, page App.63.

Here Mary has shown that §1144(b)(7) does not mean, "Supersedure shall not apply to QDROs", but instead it means "Supersedure shall not apply to State law relating to

QDROs." The California Supreme Court refused to consider this statute that provides it jurisdiction and Mary standing to sue. Instead it ruled correctly that it had concurrent jurisdiction under §1132(a)(1)(B), which was never in doubt, but refused to consider that Mary had no standing at all.

Congress recognized that this problem of standing had split federal courts and with REA expressly solved it. *Francis v. United Technologies* (1978) 458 F.Supp. 84 held that an alternate payee, as she is now known, was neither a participant nor a beneficiary. It said ERISA explicitly defined those terms, and the alternate payee there did not satisfy any of the definitions. On the other hand, *Stone v. Stone* (9th Cir.1980) 632 F.2d 740 held that the alternate payee in that case was in effect a participant for the purposes of §1132(a). The 98th Congress settled the matter. It denied alternate payees standing under federal law, that is until after the plan found their orders qualified. Instead Congress gave the alternate payees standing in their State courts to settle all disputes. The Legislative History to REA expressly attributes this result and the solution to the standing problem to REA's amendment to supersedure. That amendment, the so-called QDRO savings clause, is §1144(b)(7).

In *Mead Corp. v. Tilley* (1989) 490 U.S. 714 this Court found the question of whether ERBs were accrued benefits too important to decide without a full briefing. "Without the views of the agencies responsible for enforcing ERISA or an opinion by the Court of Appeals, we are reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers." *Id.*, p. 727. Here, the issue can now be settled on three grounds. As a matter of law, the definition of accrued benefit in ERISA not only does not reject ERBs, but actually embraces them. Also as a matter of statutory definition, read with the Legislative History and confirmed by judicial opinions, no part of any earned ERB under a plan can contain a subsidy in any part. Moreover, by statute ERBs must be treated as accrued benefits. §1054(g)(2).

Conclusion

This case is important because the opinion below threatens each of the principles REA enacted for QDROs. Examples of those principles effected in §1144(b)(7) and Subp. (B) include: (1) State, not federal, courts are the forum to settle all issues, (2) State, not federal, substantive and procedural law apply to enforce QDROs, and (3) an alternate payee may be paid as much as 100% of a participant's ERB once earned. See emphasized excerpts from REA Legislative History, Appendix G, page App.63.

This Court previously addressed Congressional intent in enacting the ERISA supersedure clause, debating without deciding the meaning of the QDRO exception. *Mackey v. Lanier Collection Agency & Serv., supra.* Now for this Court's consideration are the QDRO implementing statutes that regulate both the amount and timing of benefits. Petitioner's case provides conflicting decisions below and between U.S. Circuit Courts of Appeals regarding the meaning and application of ERISA sufficient to settle both the important federal questions of QDRO enforcement, one as to the amount and the other as to the timing of benefits.

Whether the §1054(g)(2) treatment of early retirement benefits and subsidies as accrued benefits is avoidable by practice when prohibited by plan amendment is a further subsidiary question. This and the other subsidiary questions require interpretation of the ERISA history, statutes and its Regulations, including definitions of subsidy, accrued benefit, normal retirement benefit, plan and employer.. Applicable also are federal rules of statutory interpretation (whether provisions are made redundant, if words can be ignored, and where do provisions apply) to the settling of these important questions.

The primary purpose of REA was to provide alternate payees such as MARY the right to the pension purse earned during marriage, separate from the whims of plans and participant ex-spouses. It also sought to protect those pension

benefits from delay, and the risk of loss on account of the actions or death of participants.

The practices of the Claimant are obnoxious to the purposes of ERISA as amended by REA, and in conflict with the intent of Congress expressed in the Act. Without intervention and explication from this Court, the MARYs will not have the protection and rights Congress provided, but will continue to suffer the risk of pension plan administration withholding, delaying, or even destroying their marital pension property.

Therefore Petitioner respectfully prays this Honorable Court grant her Petition for writ of certiorari.

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Respectfully submitted,

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